Ohio Valley Environmental Coalition v. Fola Coal Co., LLC, No. 16-1024 (4th Cir. 2017)

Summary

In a unanimous decision issued January 4, 2017, the United States Court of Appeals for the Fourth Circuit held that narrative water quality standards incorporated by reference into a National Pollution Discharge Elimination System (NPDES) permit are substantive permit terms, and that permittees must comply with these terms to receive the benefit of the Clean Water Act (CWA) permit shield under section 402(k).

This decision has the potential to impose severe consequences for the clean water sector in the Fourth Circuit and beyond. Pursuant to this ruling, citizen groups may be able to enforce boilerplate language in NPDES permits requiring that all discharges comply with water quality standards, including for parameters with no explicit effluent limits. The decision provides a clear path for environmental groups and courts – rather than permit writers - to translate narrative water quality standards into enforceable permit terms.

While states can impose water quality criteria as end-of-pipe limits, they must expressly act to do so; it has been NACWA's longstanding position that water quality standards cannot, by themselves, be considered effluent standards or limitations and, therefore, should not be independently or directly enforced or implemented.

The ruling calls into question the definition of "compliance," the role of the permitting agency, and the purpose of the NPDES permit. A blanket prohibition on violating water quality standards does not provide clear guidance on what a permittee must do to comply nor what targets it must meet to avoid enforcement. Yet this ruling holds that for permits with such language, the permittee must ensure that all discharges from their operations comply with all water quality standards. Without clear direction in the permit, permittees would essentially be required to step into the shoes of the permitting agency to determine if their discharges have the reasonable potential to violate a state water quality standard and then set their own permit limits to attempt to avoid such violation - a costly and impractical obligation.

Furthermore, such permit language is widespread and, therefore, the litigation risk is substantial. The Association of Clean Water Administrators (ACWA) requested information from its members (state regulatory agencies) to determine how many include blanket references to compliance with water quality standards in permits. Of the 26 states that responded, 18 indicated that they either specifically include language in permits indicating that discharges covered by the permit must not cause or contribute to a violation of a water quality standard or they incorporate state water quality standards by reference. In addition, there are at least two examples of this language appearing in Municipal Separate Storm Sewer System (MS4) general permits, which would essentially replace the maximum extent practicable standard with a requirement to meet water quality standards.

Fola Litigation Background

The permit at issue included the following statement:

> The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards adopted by the Department of Environmental Protection, Title 47, Series 2.

Among the exhaustive list of standards incorporated by reference were prohibitions against discharges toxic to aquatic life or that adversely impact the biology of an aquatic ecosystem.

Environmental groups filed a citizen suit against Fola Coal Company in August 2013 asserting NPDES permit violations for conductivity relying on the state regulation prohibiting discharges from causing or materially contributing to a significant adverse impact to the chemical and biological components of the stream's aquatic ecosystem. Plaintiffs in the case failed to raise concerns during the permitting period and waited until several years later to file a citizen suit collaterally attacking the permit. EPA likewise did not object to the permit.

District Court Decision

On January 27, 2015, Judge Chambers for the US District Court for Southern District of West Virginia ruled that despite absence of a specific effluent limit in the NPDES permit for conductivity or salinity, the discharge caused or materially contributed to a significant adverse impact in violation of the narrative water quality criteria incorporated into those permits. Judge Chambers held that with the state's numeric and narrative water quality criteria incorporated by reference into defendant's NPDES permit, those criteria constituted independently enforceable permit conditions.

In determining what the "applicable" narrative criteria require, the court made no effort to determine how the permitting authority interpreted the narrative criteria at the time of permit issuance. Instead, based on its independent, after-the-fact interpretation of the narrative criteria, the court read the boilerplate permit provision as unambiguously requiring the permittee to control sulfates and conductivity to levels set by the court *post hoc*. The court ignored the fact that both the state permitting authority and EPA were obligated to determine at the time of permit renewal whether the level of conductivity and sulfates – the pollutants at issue - disclosed by the permittee would cause or materially contribute to a violation of the applicable narrative criteria, and to include limits on those pollutants that they deemed necessary to ensure that the discharge would not cause exceedance of the criteria.

In finding that Fola's discharge caused or contributed to violations of water quality standards, the court relied upon the controversial 2011 EPA report A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams. Relying on this Benchmark, the court agreed with the plaintiffs that the discharges caused or materially contributed to a significant adverse impact to the chemical and biological components of the stream's aquatic ecosystem, finding not only that the permittee was properly subject to citizen enforcement but also finding in favor of the plaintiffs on liability.

Fourth Circuit Decision

The Fourth Circuit affirmed Judge Chambers' decision, explaining that "because the company did not comply with the conditions of its permit, the permit does not shield it from liability under the Clean Water Act, and the district court properly ordered appropriate remedial measures." In its analysis, the court rejected the idea that the reference to water quality standards reflected the obligation of the state to develop permit terms that are protective of water quality standards, finding instead that the prohibition on discharges violating water quality standards is an affirmative, independently enforceable obligation on the permittee.

The court also clarified that its holding in Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty does not excuse permittees from complying with catch-all provisions within the permit, regardless of whether the permit contains an effluent limit for the pollutant at issue. Specifically, the court reiterated the importance of compliance with the entire permit, restating its *Piney Run* holding with emphasis: "We expressly held that a permit shields its holder from liability *…as long as … the permit holder complies with the express terms of the permit* and with the Clean Water Act's disclosure requirements."

Indeed, the court explained that it "did not hold that numerical limitations on specific pollutant discharges constituted the only proper subject of regulation under the Clean Water Act," but that water quality standards remained an appropriate target for permittees despite the "shift in focus of environmental regulation towards the discharge of pollutants." Notably, the court pointed out that the permit at issue in *Piney Run* did not contain a prohibition on violating water quality standards, and therefore such a provision was not part of its analysis in that case.

The court also rejected the defendant's assertion that it did not have fair notice that the water quality standards were enforceable limits of the permit, noting that throughout the history of the permit, Fola had numerous individual opportunities to be put on notice. In doing so, the court ignored the broader question of what constitutes fair notice in the context of the permitting process, and overlooked the fact that a blanket prohibition on violating water quality standards does not establish clear compliance targets.

NACWA's Participation

NACWA participated with a coalition of industry and municipal groups in filing an amicus brief in the appeal, because of the broad implications for NPDES permittees nationwide. While the provision at issue in this case is contained in a coal mining facility permit, as mentioned above many NPDES permits contain a catch-all provision prohibiting discharges from causing or contributing to violations of water quality standards.

The facts of the case represent a long and tortured history between the state of West Virginia and the coal industry, a history the courts seemed eager to correct. NACWA feared that the matter being litigated would lead to bad and far-reaching law supplanting the Fourth Circuit's 2001 Piney Run decision on the permit shield. It was critical that NACWA go on record with the court to explain that despite the underlying actions of the state regulatory agency and the coal company permittee, a decision upholding the lower court ruling had the potential to affect NDPES permittees in every sector– including municipal wastewater and stormwater permittees.

Unfortunately, it appears that the history surrounding the case and the parties involved heavily influenced the Fourth Circuit's decision, and compliant NPDES permittees across the country will

likely be subjected to the consequences. This decision creates precedent that upends the NPDES permitting process, usurps the State's authority to set and interpret water quality standards, undermines the public's right to comment on such standards before they are implemented and enforced, and deprives NPDES permittees of fair notice, creating serious Due Process concerns. Moreover, the decision eviscerates the essence of the permit shield defense by allowing citizens who disagree with the terms and conditions of an issued NPDES permit to challenge the permit after issuance and provides an opportunity for courts and third parties to retroactively change the limits of a permit.

Permit Shield Implications

CWA permittees have been able to rely on compliance with their permit as a shield against enforcement and citizen suit litigation. CWA § 402(k) provides that "[c]ompliance with a [NPDES] permit" is considered "compliance, for purposes of sections 309 and 505 [enforcement, including citizen suits], with sections 301, 302, 306, 307, and 403 [discharge prohibitions and effluent limits], except any standard imposed under section 307 for a toxic pollutant injurious to human health." Courts and regulatory agencies have interpreted this language to mean that entities who complied with the substantive terms of their NPDES permits were shielded from enforcement and citizen suit litigation for the permitted discharges.

It is NACWA's position that the Fourth Circuit's *Fola* decision narrows its previous ruling in Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty, which held that the permit shield extended not only to pollutants specifically listed in the permit, but also to those disclosed in the permit application and therefore reasonably contemplated by the permitting authority in conducting a reasonable potential analysis and issuing the permit. This framework provided an element of certainty to regulated entities—permits serve as a mechanism by which the permitting agency determines what pollutant levels are protective of water quality and provides clear and final notice of a permittee's compliance obligations.

The Fourth Circuit nuanced change of heart in *Fola* undermines this certainty and ties compliance, and eligibility for the permit shield, to targets that are often undefined and difficult to quantify.

EPA Draft Guidance on Conductivity

In line with EPA's position expressed in the amicus brief the Agency filed with the Fourth Circuit in the *Fola* case, EPA announced the availability of the Draft Field-Based Methods for Developing Aquatic Life Criteria for Specific Conductivity document for public comment in the December 23, 2016 *Federal Register*. One of the documents used to develop this report was the 2011 EPA report A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams, relied upon by the district court in *Fola*.

EPA asserts that once the *Draft Field-Based Methods* document is final, states "located in any region of the country may use the methods to develop field-based [Specific Conductivity] SC criteria for adoption into water quality standards. The draft methods *are not a regulation* and *do not impose legally binding requirements*. The methods would provide assistance to states in developing science-based SC criteria that reflect ecoregional- or state-specific factors such as background SC and ionic composition." Emphasis added; *see* EPA Fact Sheet.

There has been a change in state regulatory agencies' approach to total dissolved solids and conductivity since the publication of the 2011 report, which was also not binding and not a

regulation. If finalized, states will consider the Draft Conductivity guidance in adopting water quality standards for conductivity, which can and will result in a change to the effluent limits imposed in discharge permits issued by the States and EPA for discharges.

Comments are due February 21, 2017. The draft guidance is not subject to the regulatory freeze order issued by the new administration on January 20. While that order considers guidance documents as regulation for purposes of the freeze, it does not address draft guidance and regulations. The Federal Water Quality Coalition, among other stakeholders, has submitted a letter requesting an extension to the comment period.

NACWA members in the West have indicated that stricter conductivity limits will be very challenging. Higher levels of conductivity are often the result of any activity that disturbs the surface of the earth, thereby increasing dissolved solids. Thus, this guidance would have a significant impact on the coal mining sector. Given President Trump's commitment to revive the coal industry, it is reasonable to predict that the comment period will be extended and/or the draft guidance will be withdrawn.

This issue is of particular concern in light of the *Fola* decision. Even in the absence of a conductivity limit in the permit, environmental groups may bring CWA citizen suits alleging violations of the narrative standard in reliance upon the recommendations in the guidance document.

Potential Impacts on NACWA Members

NACWA members should be prepared to respond to this decision at the local level. While the Fourth Circuit decision has potentially broad implications, any NPDES permittee facing a similar challenge outside the Fourth Circuit should argue that its application should be limited to the Fourth Circuit. In addition, permittees can distinguish their facts from the unique facts of the *Fola* case (e.g., Fola argued lack of notice and that the boilerplate catch-all provision could not reasonably be interpreted to impose obligations on permittees, but the state permitting authority had previously enforced against the permittee's parent company for violations of the same permit language).

NACWA members are encouraged to carefully review their existing permits and consider what this decision means for their permit compliance. If similar boilerplate language exists in a permit, NACWA members should attempt to work with their permitting authority to remove such language and work to develop clear and definitive final permit language. Members should also carefully review MS4 general and individual permits for this language.

NACWA will continue to engage with state and federal regulators to urge revision of boilerplate permit language incorporating water quality standards by reference. Additionally, the Association is developing an aggressive strategy in response to the ruling, which will likely include legal action and regulatory and statutory changes.